



# ***FINANCE AND ADMINISTRATION COMMITTEE***

**Members present:**

Mr SW Davies MP (Chair)  
Mrs EA Cunningham MP  
Mr R Gulley MP  
Mrs FK Ostapovitch MP  
Mrs D Scott MP  
Mr MA Stewart MP

**Staff present:**

Ms D Jeffrey (Research Director)  
Dr M Lilith (Principal Research Officer)  
Ms L Whelan (Executive Assistant)

## **PUBLIC BRIEFING—INQUIRY INTO THE PUBLIC SERVICE AND OTHER LEGISLATION (CIVIL LIABILITY) AMENDMENT BILL 2013**

### **TRANSCRIPT OF PROCEEDINGS**

**MONDAY, 2 DECEMBER 2013**

**Brisbane**

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**Committee met at 9.13 am**

**HOLM, Ms Katie, Executive Director, Legislation and Policy, Public Service Commission**

**REED, Mr David, Director, Legislation and Policy Team, Public Service Commission**

**VAN DER LAAK, Ms Vivienne, Manager, Legislation and Policy Team, Public Service Commission**

**BARNETT, Deputy Commissioner Ross, Queensland Police Service**

**BRADLEY, Ms Kate, Executive Director, Legal Division, Queensland Police Service**

**OBST, Mr Greg, Assistant Queensland Police Service Solicitor, Queensland Police Service**

**CHAIR:** Good morning, ladies and gentlemen. I declare the public departmental briefing of the Finance and Administration Committee's inquiry into the Public Service and Other Legislation (Civil Liability) Amendment Bill 2013 open. I am Steve Davies and I am a bit of a ghost at the moment, I am sorry. I am the chair of the committee and the member for Capalaba. I have the dreaded lergy which I do not want to spread around. The other members of the committee are Mrs Liz Cunningham MP, member for Gladstone; Mr Reg Gulley MP, member for Murrumba; Mrs Freya Ostapovitch MP, member for Stretton; and Mr Mark Stewart MP, member for Sunnybank. We have apologies from Bruce Flegg and, under standing order 202, Desley Scott, the member for Woodridge, is standing in for Curtis Pitt MP, the deputy chair and member for Mulgrave.

The purpose of this hearing is to receive information from the department about the bill, which was referred to the committee on 19 November 2013. This hearing is a formal proceeding of parliament and is subject to the Legislative Assembly's standing rules and orders. The committee will not require evidence to be given under oath, but I remind you that intentionally misleading the committee is a serious offence. Thank you for your attendance here today. The committee appreciates your assistance. You have previously been provided with a copy of instructions for witnesses, so I take that as read. Hansard will record the proceedings and you will be provided with a transcript. This hearing will also be broadcast.

I remind those in attendance at the hearing today that the proceedings are similar to parliament to the extent that the public cannot participate in the proceedings. In this regard, I remind members of the public that under the standing orders members of the public may be admitted to or excluded from the hearing at the discretion of the committee. I remind committee members that the officers are here to provide factual and technical information. They are not here to give opinions about the merits or otherwise of the policy behind the bill or alternative approaches. Any questions about the government or opposition policy that the bill seeks to implement should be directed to the responsible minister or shadow minister or left to debate on the floor of the House. I also request that all mobile phones be turned off or switched to silent mode and I remind you that no calls are to be taken inside the hearing room. At this point I will open up the floor for any officer to make an opening statement.

**Ms Holm:** Good morning, committee. My team has been principally responsible, in collaboration with our colleagues from police, in developing the bill for the Premier.

**Deputy Commissioner Barnett:** Good morning, committee members. We are here obviously to support the Public Service Commission as this legislation has impacts on both sworn and unsworn QPS members.

**Ms Holm:** If it is all right with the committee, I might provide some introductory comments to the bill which might help trigger some of your questions or queries. As you are aware, the bill amends the Public Service Act and also the Police Service Administration Act on similar terms. So  
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the comments will generally be in relation to both acts, but my colleagues from police will be able to give specific comment in relation to how the provisions work. The key points of difference are that the Public Service Act applies to state employees but does not include volunteers while the Police Service Administration Act applies to employees of the QPS and volunteers who may be assisting police with their duties. The bill provides for immunity from civil liability for state employees and Queensland Police Service employees, but it does not provide criminal immunity. The immunity applies to conduct or the result of conduct engaged in in an official capacity. The bill transfers the liability from the employee to the state or if the employee is engaged by a body corporate to that body corporate.

The bill proposes a right of recovery if the employee's conduct was other than in good faith and with gross negligence. There are currently over 300 immunity provisions contained in legislation with varying tests and application and seven different indemnity guidelines. Those guidelines require employees to apply for assistance. The amendments seek to provide a consistent standard and the existing provisions will be reviewed with a view to repealing any provisions that become redundant in those other pieces of legislation as a result of these amendments. So that is an overview of the bill. We would welcome any questions about its operation from the committee.

**Mr GULLEY:** Good morning, Katie. I have a question for you. This looks like very logical legislation, but what is the history of why it has not been a blanket provision in the past? What is the history of why a policeman or a public servant have not received indemnity in the past? What is the journey to today?

**Ms Holm:** I suppose I would resist speculating on what the previous policy positions might have been, and certainly my colleagues from police might have a different rationale for the way your scheme has operated to date. But certainly as things stand now, employees have an extent of protection but there are steps that must be taken before that tick of approval is given. As I was explaining, there are myriad different provisions from where that is sourced and in fact seven different guidelines for people to operate under. One theory might be that the system as it stands now has been constructed because of a hesitation in wanting to make sure that any state protection is actually, at the outset, reviewed and tested before that permission is given. So it puts the test first rather than actually giving an upfront immunity. Certainly, our observations at the Public Service Commission based on feedback from employees has been that the question mark, if you like, at the beginning rather than a green light of protection from the outset is actually impacting on the way services are delivered and that employees have a hesitation and have these thoughts in their mind such as, 'Will I be given protection?', the idea being that if this is made clear from the outset hopefully innovation will not be stifled and employees will know that they have this protection.

**Mrs CUNNINGHAM:** I have one other fundamental question before we get into the detail. In a lot of other acts the state is given immunity. It is not eligible to be sued. It is not open to be sued. It is not open to be held accountable financially or in any other way. Is there any risk that members of the community are going to have nowhere to go because this legislation removes liability—and I do not have a problem with that principle—from the individual employees to the state? Is there any risk that the state will also be able to throw its hands up and say, 'We're not liable because we're the state,' and therefore, for example, an injured party has nowhere to go to in order to get assistance—and deserved assistance—from their perspective?

**Ms Holm:** There is no intention—there is no possibility—that these provisions would squash any right for recovery from a member of the community. So if the right to sue is there now, it does not extinguish that whatsoever. It simply replaces the name of the individual employee with the name of the state. It does not prevent the litigant from using the employee's name at the outset if they are not aware of how these provisions work. That would be attended to after the proceedings had started.

**Mrs CUNNINGHAM:** Thank you.

**Mr GULLEY:** I have a further question for Katie, and my apologies to the police; we will ask you questions sooner or later. The press has focused on the police being able to act fairly and with confidence. When it comes to the Public Service, is that a complete blanket over all public servants—that is, teachers, firies, ambulance drivers, our medical staff in our hospitals? Do you know of any class or style of public servant who may be excluded, or is this all public servants within the Queensland Public Service?

**Ms Holm:** It is a comprehensive coverage.

**Mr GULLEY:** Very good.

**CHAIR:** I have a question about the right of recovery, so I suppose that would be to Katie. With the right of recovery, how does that work? If a person is found to be negligent themselves, having done something dishonest or whatever, and the government then has paid out some numbers to the person who originally was the litigant, how does that work? How will the government then get those moneys back off that person?

**Ms Holm:** There is a right of recovery, and there are two limbs to the test. So both limbs would have to be satisfied so that the employee failed both limbs, and the legal process defines those terms in terms of without good faith and gross negligence. So the state could recover in that instance and it would just be through their own proceedings to seek recovery, either by negotiated settlement or formal proceedings. So it does not extinguish the right of the state to recover should the circumstances require it.

**Mrs OSTAPOVITCH:** I just want to announce that I may have a possible conflict of interest as my son is a police officer, but I do have a question. Could you give me an example please of where a public servant may be hindered in performing their duties because of a fear of being sued?

**Ms Holm:** Certainly. As I referred to earlier, in terms of the consultation that the Public Service Commission did in terms of engaging with the Public Service workforce earlier this year, there were approximately 20,000 employees who provided a view about working for Queensland and what that means and this was a very strong theme—that is, the risk of litigation was impacting on the way they were doing their job. I think one of the other members referred to the various types of employees who have very regular and close engagement with members of the public, and my colleagues from police certainly have that on a minute-by-minute basis almost. Other examples would be teachers, nurses and where there is very close engagement and the potential for, even though the person is working appropriately and fulfilling all of their responsibilities, something still going wrong—ambulance officers for instance. An example that we have thought of—these are not grounded in actual case studies—might be an ambulance officer who is assisting to revive a patient and in that process happens to break a couple of ribs if they have not been particularly adept at what they were doing, but all the while they were trying to fulfil their duties and trying to save the person's life.

So that is an example where that might come into play. Another example might be a disability support worker who, in fulfilling their duties and trying to prevent one of their clients from engaging in harm, or crossing a road recklessly, and in restraining that client they may injure them in some way. Again, it is in the performance of their role but it is not an intentional injury that is being caused. So those are the sorts of examples that have come to mind when we have been developing this.

**Mrs OSTAPOVITCH:** So what you are saying is that a person may not perform their duties 100 per cent because of a fear that they may do something wrong and be sued?

**Ms Holm:** That is certainly the feedback that we are getting. It is influencing people's decision making in terms of how they implement their roles and responsibilities, but police might have far more active and relevant examples that you might wish to draw from.

**Deputy Commissioner Barnett:** I might start before I hand over to Kate. An example of a situation that we might be talking about might be where officers in good faith take out and execute a search warrant on particular premises. As a result of data that is incorrect they might end up at the wrong house and then in the course of executing the search warrant they have to detain people inside the house who turn out not to be the people they are looking for. Those sorts of things can happen with people acting in good faith, but they are the sorts of issues that can confront police on a daily basis. I am sure Kate would have plenty of other examples.

**Ms Bradley:** We also have a large staff member civilian cohort within the Queensland Police Service and examples I think primarily would be assistant watch-house keepers who have been granted additional powers to assist police officers to do certain roles. For example, they may need to utilise and exercise some force with a member of the public who has come into the watch-house. They would be protected under the Police Service Administration Act amendments in terms of their role.

We also have police liaison officers, who are civilian officers although they wear a uniform, and they are constantly part of the many millions of interactions that we would have. In addition, we have other support officers, for example, scenes of crime and other forensic officers, who are civilians who are at crime scenes. They may damage property or have to engage otherwise with members of the public. As a result they would also have coverage by means of the amendments to the Police Service Administration Act.

**CHAIR:** So under clause 4 they would be the other persons involved? Would they come under that category? Is that right?

**Ms Bradley:** I am referring specifically to the part 3 amendments to the Police Service Administration Act—clause 13, 10.5(1), which refers to a staff member. They are included in that category, because our staff members are public servants. They are a little bit different, obviously, from our sworn cohort who are employed under the Police Service Administration Act.

**Mr STEWART:** Would that include the people who, for example, work in volunteering in policing—the VIP programs? Would they be covered under this?

**Ms Bradley:** Yes, they are. Again, referring to clause 13, they are special category, 10.5(d). We have quite a large volunteering in policing program. They effectively are people with us under a free contract of service providing some very good community contact at police counters, generally at fronts of stations et cetera. The sorts risks, if you like, they may be subjected to are slightly different perhaps from the physicality that might involve some of our other staff members. The provisions are broad enough to cover discrimination complaints. For example, if in an interaction in volunteering in policing a member may consider they have acted in a discriminatory manner, which is an unlawfully discriminatory manner, these provisions would also cover those. The term ‘volunteer’ is also broad enough that it may not just cover those who are on a contract with us, but you may be aware that under police legislation we are also able to get a member of the public to assist us, exercise a particular force, and it may be that they may be considered a volunteer or a civil assistant who would come in to assist us and they may also get some protections if they are not otherwise covered under the Police Powers and Responsibilities Act.

**Mr STEWART:** What about with the Public Service Commission as well? Obviously, there are many government departments that have volunteers, for example, national parks. Would the volunteers be covered under changes to the Public Service Commission?

**Ms Holm:** The amendments to the Public Service Act do not include volunteers.

**Mr STEWART:** What about with the government in some areas going towards contractual arrangements with, say, senior medical staff? As a contractor and not an employee, are they covered under the scheme or are they excluded as well?

**Ms Holm:** Yes, they are.

**Mr Reed:** I can answer that. Contractors would not be covered under the legislation but the legislation covers people who are exercising delegations on behalf of the state. So it is primarily focused on employees of government departments, of entities that represent the state and it also covers people who are on the management boards of those entities. That is a primary focus of it and people exercising the delegations, as I indicated before.

**Mr STEWART:** Okay.

**Ms Holm:** So if people are performing the functions under an act, for instance, then you would be covered through a delegation.

**Mr STEWART:** Okay.

**Mr GULLEY:** You were talking about the two limbs being good faith and gross negligence. To give our Public Service confidence, do you see that as a high level of test? If and when this is ever tested in law, what is the casework that would be referred to? Is it a high test or is it a relatively low test?

**Ms Holm:** Perhaps we can talk about what those terms mean or how they are recognised and you might be able to draw your own conclusions as to whether that is a high test or a low test. Good faith is a term that is often used in the legal context that we have been discussing. It is defined and given the meaning through case law. The ordinary legal meaning relates to there being honesty or an absence of malice or ulterior motive in terms of the good faith. Gross negligence is perhaps a more regularly defined legal term. The sorts of legal phrases that are attached to that are grave, serious or significant departure from the standard of care which a reasonable person would have observed in all the circumstances or what you might describe as conduct that is worse than negligent but not actually reckless. So by all accounts if you are performing your role with all of the information that you have available to you, then you would be covered, yes.

**Mr GULLEY:** Thank you.

**Mrs CUNNINGHAM:** There was no public consultation when this bill was drafted. That is the information that I have been given. There was none either with Police or yourself. Firstly, why was there not public consultation? Secondly, how will the community know the new process? How will they be educated? Will the new process for the community be more complex when they are applying for recompense?

**Ms Holm:** Perhaps if I start with the last question. I would have thought actually it would be a lot easier, because you do not need to track down the individual's name; you know that they work for the Queensland Police Service or the particular department that you have been dealing with. So you could simply start your process using those entities rather than thinking, 'I need to find the actual individual employee.'

In relation to public consultation, there has not been public consultation, but as it relates to the state's arrangements for providing legal assistance to employees then the major stakeholder was employees. I mentioned earlier that there has been that engagement with employees earlier this year where this theme came up very significantly, actually, in all of the different cohorts of the 20,000 employees we engaged with. So certainly, ordinary communications would flow, for instance, with the Queensland Law Society and the Bar Association where their members would be likely to be working in this field on behalf of members of the community.

**Mrs SCOTT:** Within the realm of Health there are many ethical and issues of conscience and so on. Do you foresee that there could be any issues around that where nursing staff, doctors or so on have a conscience issue on whether to treat or not to treat and things like that?

**Ms Holm:** I would not see that as being relevant, no. It would not be an excuse, if you like, for failure to intervene or provide treatment, no.

**Mrs SCOTT:** Okay.

**Ms Holm:** Whether somebody else wished to test that is another matter, but that is not the intended scope.

**Mrs SCOTT:** So if you are an employee of Queensland Health you are expected to treat as Queensland Health decrees rather than step aside from a treatment if you had a conscience issue with that?

**Ms Holm:** I am not sure that I am qualified to actually provide comment on that, Mrs Scott. Obviously, there are the standards that Queensland Health require and all of the professional groups who make up a health employee group. So I imagine that they would set those standards.

**Mrs SCOTT:** Thank you for that.

**Mrs OSTAPOVITCH:** In light of these changes, will the various teaching institutions that teach police or ambulance officers provide extra training to perhaps concentrate on the diligence to make sure that they do not get slack in their duties, that they still perform 100 per cent? You take away that fear—and that is great—but will there be some sort of extra training program to ensure that public servants will still be 100 per cent diligent anyway? I do not know whether I am coming across clearly. We would not want people to just think, 'Well, I can do anything because I'm not going to get sued.' We have to also protect the taxpayer and the government.

**Deputy Commissioner Barnett:** A very big part of our training with not only our new recruits but also cradle to grave is the reinforcement of the code of conduct and the legal and ethical responsibilities that our officers have in upholding the law. They are very well aware that, despite any protections that might be afforded under this bill should it be passed, they are responsible for their own conduct and that members of the community have the right to make complaints. As well as taking legal action in appropriate circumstances, members of the public have the right, which we encourage, and also members within the department are obliged by law to report issues of breach of discipline or misconduct that might give rise to legal proceedings like this. So our members are very well aware and our ethics training is very strong in that regard.

**Mrs OSTAPOVITCH:** I assume that you would also have disciplinary action as well. If a complaint was raised, you would take disciplinary action yourselves in whatever department it is; is that correct?

**Deputy Commissioner Barnett:** Yes, that is correct. By way of example, it is the current trend that about a quarter of all complaints that are made against police are made internally by other officers within the department, which I think is evidence of a strong culture that any sort of misconduct that might lead to these sorts of proceedings is not ignored. Any complaint that is made is, of course, overviewed by the Crime and Misconduct Commission as well.

**Ms Holm:** I could add to that in terms of it being a mirror image almost for the rest of the public sector. In particular, under the Public Service Act, section 26 talks about the work performance principles. They are very strong messages around the expectation of the level of performance and service that a Public Service employee must provide in recognition of the privileged position that they have in serving the public, and those terms are used in the act. Again,

the code of conduct, which is referenced in the Public Service Act and then also under the Public Sector Ethics Act, speaks very clearly about standards and the way duties should be performed. The Public Service Act, similarly, has a whole scheme for discipline should performance not be up to par.

**Mr STEWART:** In considering the amendments that you have made to the legislation, did the government consider the recent amendments made in New Zealand due to the decision in the case of *Couch v Attorney-General*?

**Ms Holm:** I might check with my colleagues. Sorry, we are not aware of that case.

**Mr STEWART:** In that case they took the immunity approach. Can you confirm that the immunity approach taken in this bill does not limit a wronged party from pursuing damages against the state where appropriate? How does the legislation operate to ensure that this is not the case, that they cannot take the immunity approach?

**Ms Holm:** It is an indemnification approach rather than an immunity approach. As we were referring to in answer to Mrs Cunningham earlier, it does not extinguish a right to seek recovery from an individual.

**Mrs CUNNINGHAM:** That would be my greatest fear that somehow or another by oversight or omission the liability that is attached to individuals is lost when it is transferred to the state. Just in the short time that I have been in parliament there have been a number of acts that have gone through that completely remove any liability of the state in the circumstances. I would hate to see members of the community who do have a case to bring in terms of conduct that has caused them physical harm, psychological harm or other damage suddenly, inadvertently or otherwise, having nowhere to be able to proceed with the case where previously they did. If I can be assured that that is not going to happen in any way, that would be good.

**Ms Holm:** The bill does not extinguish any rights to commence proceedings. It simply clarifies or changes who those proceedings would be brought against.

**Mrs CUNNINGHAM:** Can I ask one follow-up question. There was an incident in my electorate a number of years ago where an officer of the Public Service, a reasonably senior person, received an application for a licence to take certain native plants. It was a time sensitive application. The officer who took the application had a look at it and put it in his bottom draw and went on holidays. By the time he came back from holidays the opportunity was lost and the couple who had made the application were significantly financially disadvantaged. It sent them bankrupt. Is there any risk that an opportunity for compensation in those circumstances would be diminished? Could it be argued that him doing that was not grossly negligent or that in some other way his responsibility does not attach to the state?

**Ms Holm:** A scenario like that under this bill, provided there was no prohibition in the legislative scheme where that licence was issued—

**Mrs CUNNINGHAM:** No, there wasn't.

**Ms Holm:** Provided there was no prohibition there, this would cover that kind of scenario exactly.

**Mrs CUNNINGHAM:** Thank you.

**Ms Holm:** Provided there was loss, and you have said in that scenario there could have been.

**CHAIR:** I have a quick question about clause 11 regarding the transitional provisions. Obviously there will be stuff that has happened before this legislation comes in. How do you propose that will be handled under section 288?

**Ms Holm:** Sorry, I did not hear the last part of your question.

**CHAIR:** Sorry. Could you please explain the transitional provisions under proposed section 288, regarding the transition time of stuff that has happened pre this legislation as it rolls into the new legislation?

**Ms Holm:** I might start with a general comment and then refer to my colleagues if they want to add some more detail. Essentially if there is a course of conduct that includes conduct before the passage of the bill and afterwards, then the whole thing would be covered. You would be able to capture all of that.

**CHAIR:** Under the new bill?

**Ms Holm:** Yes, under the new bill.

**Ms Van Der Laak:** Just in addition to that, if anything occurred prior to the amendments, assuming they move forward, it would be covered under existing provisions as at the time. So it is dealt with in both ways—new stuff would be under the new arrangements; old would be under the old; and anything that forms a course of conduct would be under the new.

**Mr STEWART:** I do have one follow-up question from earlier—that is, why is the legislative immunity seen to be better than the indemnity approach?

**Ms Holm:** Why is it better?

**Mr STEWART:** Why is it seen to be better and why are we going about it that way?

**Ms Holm:** I do not know that I can comment that it would be better. I am not an expert on the New Zealand system but they do have a very different insurance system to the Australian states. I suppose what this system allows for is that, should it be found that the employee was doing the wrong thing and that this test was not actually met, it still provides the state with an avenue of recovery. I think one of the members referred earlier to the protection of the state's taxpayers and the state's interests. It still enables the state to be protected, but it does not extinguish the right of a citizen from taking those proceedings.

**Mr STEWART:** Thank you.

**CHAIR:** There being no further questions, we will now conclude this public departmental briefing. If members require any further information, we will contact you. We do really appreciate your attendance today. The committee appreciates your assistance. I declare the briefing closed.

**Ms Holm:** Thank you very much.

**CHAIR:** Is it the wish of the committee that the evidence given here before it today be authorised for publication pursuant to section 50(2)(a) of the Parliament of Queensland Act 2001? There being no objection, it is so authorised.

**Committee adjourned at 9.55 am**